

DOCKET NUMBER 114-1

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**UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

In Re:) Case No. 05-05926-PBINV
FRANCIS J. LOPEZ,)
Alleged Debtor.)
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT OF MOTION**
) **FOR AN ENFORCEMENT**
) **ORDER IMPOSING MONETARY**
) **SANCTIONS AGAINST THE DEBTOR**
)
) **[BIFURCATED PHASE II]**
)
) Date: November 19, 2007
) Time: 2:00 p.m.
) Judge: The Honorable Peter W. Bowie
) Ctrm: 4
)
)
)

20 Pursuant to Rule 37(b) of the Federal Rules of Civil Procedure (“FRCP”), made applicable
21 to these proceedings by Rule 9014(c) of the Federal Rules of Bankruptcy Procedure (“FRBP”),
22 Petitioning Creditors respectfully submit their Motion for an Order from this Court imposing
23 monetary sanctions against Lopez in the amount of \$12,133.50, consisting of actually-incurred
24 legal fees as follows: (a) \$3,155.00 for preparing this motion; (b) \$2,164.50 for preparing the
25 necessary documents and questions for Lopez’s deposition; (c) \$224.00 for conferring with
26 Lopez’s attorney regarding Lopez’s *last minute* failure to appear for his deposition; and
27 (d) \$6,590.00 for preparing Petitioning Creditors’ renewed motion for the monetary sanctions
28 originally requested on May 24, 2007.

I. INTRODUCTION

“Unless Rule 37 is perceived as a credible deterrent rather than a ‘paper tiger,’ . . . the pretrial quagmire threatens to engulf the entire litigative process.”¹

4 This is the second sanctions motion Petitioning Creditors have brought to redress
5 discovery abuses by the Alleged Debtor — Francis J. Lopez ("Lopez").² Lopez's unreasonable
6 and unjustified delay tactics have dragged the discovery portion of Phase II of this case out for
7 almost a year, and — despite the imposition of evidentiary sanctions, multiple admonishments
8 from this Court, and the threat of \$4,242 in monetary sanctions — Lopez remains undeterred. As
9 set forth below, for the past three months, Petitioning Creditors have been attempting to take
10 Lopez's deposition. True to form, Lopez feigns cooperation, and then, at the last minute, proffers
11 some excuse as to why he can not comply.

12 On June 25, 2007, counsel for Lopez (Jonathan Hayes) and Petitioning Creditors (Scott
13 Keehn) conferred in person regarding Petitioning Creditors' request to take Lopez's deposition.
14 At that time, Mr. Keehn stated that he would like to calendar Lopez's deposition before July 31,
15 2007 because he would be out of the office for virtually the entire month of August. The attorneys
16 agreed that either July 20 or July 27 would work on their calendars, and Mr. Hayes stated that he
17 would inquire as to Lopez's availability on those dates. Three days later, on June 28, 2007, Mr.
18 Hayes emailed Mr. Keehn the following message: *"I have spoken to my client about the deposition
19 dates we discussed, July 20 or 27. He is checking his calendar. I will let you know shortly."*
20 (Emphasis added.)

21 Twenty-two days later — in the early evening of July 20, 2007 — Mr. Hayes transmitted
22 an email suggesting, for the first time, July 31, 2007, as an available date for the deposition.
23 Given that July 31, 2007 would be Mr. Keehn's last day in the office before a 30-day vacation, he
24 knew he would be fully consumed with matters necessary to be completed in preparation for that

¹ *Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1064 (2nd Cir. 1979).

1 absence. Because of that, and because of the fact that he had received absolutely no
 2 communication from Mr. Hayes' office following the June 28, 2007 email, Mr. Keehn issued and
 3 mailed to Mr. Hayes a notice of Lopez's deposition for Tuesday, September 11, 2007, at 9:00 a.m.
 4 in San Diego.

5 On July 31, 2007, this Court conducted a Status Conference wherein Mr. Keehn reported
 6 to the Court the events summarized above, including the fact that Petitioning Creditors had
 7 noticed Mr. Lopez's deposition for September 11, 2007. Mr. Hayes stated in open court that he
 8 would communicate that information to Mr. Lopez, and inform Petitioning Creditors if Lopez
 9 could not attend his deposition on the scheduled date. That was the last Petitioning Creditors
 10 heard from Mr. Hayes until September 10, 2007.

11 Reasonably assuming Lopez's deposition would proceed on September 11, 2007, the office
 12 of the counsel for Petitioning Creditors spent a total of 7.7 hours (constituting attorney and
 13 paralegal time) to prepare the necessary documents and questions. Petitioning Creditors were
 14 billed \$2,164.50 for that time.

15 In the afternoon of September 10, 2007 — less than 24 hours before the deposition was
 16 scheduled to begin — Lopez's attorney sent Mr. Keehn a brief email stating that Lopez was
 17 "*unable to make travel arrangements for the deposition tomorrow.*" The email suggested October
 18 8, 2007 or October 22, 2007 as possible dates for the deposition. Lopez's deposition is currently
 19 scheduled for October 22, 2007 at 9:30 a.m. based on Mr. Hayes' representation that it was an
 20 acceptable date and time. This latest delay caused attorney Keehn to spend an additional 0.7
 21 hours conferring with attorney Hayes. Another 25.7 hours was spent reviewing the requisite
 22 evidence, and drafting the declarations in support of Petitioning Creditors renewed motion for the
 23 monetary sanctions originally requested on May 24, 2007. The bulk of that time was spent setting
 24 forth a clear, comprehensive record for this Court of Lopez's egregious history of delay and non-
 25 compliance with court orders.

26 As stated in open court on June 25, 2007,³ once Lopez's deposition is conducted,
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28 ³ See, 6/25/07 Transcript at p. 18. [Docket Item 110.]

1 Petitioning Creditors intend to prepare and file a summary judgment motion to establish that
 2 Lopez was in fact not paying his debts as they came due as of the date of the involuntary petition.

3 Lopez's past misconduct in this case mirrors his extensive misconduct in other litigation
 4 involving Lopez and Petitioning Creditor Alan Stanly in other San Diego courts, as detailed in the
 5 Declaration of Timothy P. Dillon filed herein on September 27, 2007, and incorporated herein by
 6 this reference.⁴ Considering Lopez's pervasive custom and practice of refusing to perform his
 7 duties as a litigant unless and until he is [forensically] bludgeoned into submission by the court, it
 8 appears clear that monetary sanctions must be imposed. Without a significant sanctions order,
 9 Petitioning Creditors do not believe that Lopez will ever voluntarily appear for, and participate in
 10 good faith at, his deposition in this case.

11 II. DISCUSSION

12 A. **Monetary Sanctions are a Necessary and Appropriate Response to Lopez's 13 Unreasonable Pattern of Delay, Avoidance and Willful Non-Compliance.**

14 "Federal Rule of Civil Procedure 37 authorizes the district court, in its discretion, to
 15 impose a wide range of sanctions when a party fails to comply with the rules of discovery or with
 16 court orders enforcing those rules."⁵ Here, FRCP 37 is made applicable to these proceedings by
 17 FRBP 9014(c), and grants this Court broad discretion to tailor appropriate sanctions for Lopez's
 18 continued, unreasonable refusal to perform his duties as a litigant, and participate in discovery in a
 19 meaningful way.⁶

20 Where, as here, an alleged debtor has engaged in a course of conduct clearly designed to
 21 avoid his discovery obligations, even the seemingly "harsh" sanction of striking the debtor's
 22 answer and adjudicating him a bankrupt is both appropriate and necessary to avoid encouraging "a

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 24 ⁴ See, Docket Item 111.
 25 ⁵ *Wyle v. R.J. Reynolds Industries, Inc.*, 709 F.2d 585, 589 (9th Cir. 1983).
 26 ⁶ *Matter of Visioneering Const.*, 661 F.2d 119, 123 (9th Cir. 1981) ("The bankruptcy
 27 court, faced with an obstreperous alleged bankrupt, unequivocally had the power to apply
 28 Fed.R.Civ.P. 37 sanctions for obstruction of discovery"); *In re Williams*, 215 B.R. 289, 299 (Dist.
 Ct. D.R.I. 1997) ("the choice and severity of the sanction imposed is a matter reserved to the
 sanctioning court's discretion").

1 blatant disregard for the discovery mechanism.”⁷ Such terminating sanctions are likewise
2 appropriate where, as here, a litigant’s “pattern of delay and avoidance” includes unreasonably
3 stonewalling a properly-noticed deposition.⁸ Petitioning Creditors are willing – for the moment –
4 to stop short of requesting terminating sanctions, and accept monetary sanctions to enable this
5 case to proceed forward to summary judgment on the merits.

6 Monetary sanctions are the “mildest” on the “spectrum of sanctions” provided in FRCP
7 37.⁹ Here, such sanctions may properly include the fees incurred in: (a) preparing for the
8 09/11/2007 deposition that was unreasonably cancelled at the last minute, (b) renewing the
9 05/24/2007 request for monetary sanctions, and (c) bringing the current motion for additional
10 sanctions.¹⁰ Payment of these amounts is a fair and proportionate response to Lopez’s misconduct
11 given that none of the expenses would have been incurred but for his unreasonable stonewalling.
12 Indeed, where a “proceeding has been caused entirely by [a party’s] failure to comply with their
13 discovery obligations, the Court could impose the entire cost of the proceeding on [that party].”¹¹
14 Requiring the offending party to pay for the expenses caused by their misconduct “sends a strong
15 message that playing ‘hide the ball’ in discovery does not go unpunished.”¹²

⁷ *In re Rice*, 14 B.R. 843, 846 (9th Cir.BAP 1981); *Matter of Visioneering Const.*, supra, 661 F.2d at 123 (court’s order striking alleged debtor’s answer was an appropriate sanction since the debtor had “deliberately and obstinately refused to cooperate with discovery requests and court orders”).

⁸ *De Falco v. Oak Lawn Public Library*, 25 Fed.Appx. 455, 457 (7th Cir. 2001) (terminating sanctions appropriate where the plaintiff “did not miss only a single discovery deadline, and his refusal to attend his deposition flouted the district court’s order and exemplified the delay and avoidance to which the court referred”); see also, (terminating sanction was proper where defendant’s “flouting of the district court’s authority and [plaintiff’s] right to depose him furnished adequate proof that he acted willfully”); *Shawmut Boston Intern. Banking Corp. v. Duque-Pena*, 767 F.2d 1504, 1507 (11th Cir. 1985); *Ziontz v. Food Fair Stores, Inc.*, 31 F.R.D. 295 (E.D.Pa.1962).

⁹ *Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, supra, 602 at 1066 (“The mildest [discovery sanction] is an order to reimburse the opposing party for expenses caused by the failure to cooperate”).

¹⁰ *Goldman v. Alhadeff*, 131 F.R.D. 188, 192 (Dist. Ct. W.D. Wash. 1990).

¹¹ *L. Tarango Trucking v. County of Contra Costa*, 202 F.R.D. 614, 620 (Dist. Ct. N.D.Cal. 2001).

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Id.

B. Sanctions Must be Imposed in Light of the Entire Record

2 “[S]anctions must be weighed in light of the full record in the case.”¹³ Here, it took
3 Petitioning Creditors over six months to receive partial, inadequate responses to their written
4 discovery. That portion of discovery has now concluded with this Court’s imposition of
5 evidentiary sanctions prohibiting Lopez from proffering any evidence not produced pursuant to
6 those written requests. The only remaining discovery is Lopez’s deposition, which Petitioning
7 Creditors have been attempting to take for over 3 months. Petitioning Creditors would have
8 preferred to schedule Lopez’s deposition back in January or February of this year, but were forced
9 to delay that process by Lopez’s refusal to provide meaningful responses to the written discovery
10 which Petitioning Creditors needed to review and analyze before concluding this discovery phase
11 with Lopez’s deposition. “Only by requiring [Lopez] to pay for [Petitioning Creditors]
12 preparation for and participation” in the unnecessary discovery proceedings can this Court redress
13 the harm and prejudice inflicted on Petitioning Creditors and the judicial process.¹⁴

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¹³ *Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, supra, 602 F.2d at 1068.

¹⁴ *L. Tarango Trucking v. County of Contra Costa*, supra, 202 F.R.D. at 620; see also, *G-K Properties v. Redevelopment Agency of City of San Jose*, 577 F.2d 645, 647 (9th Cir. 1978) (“Litigants who are willful in halting the discovery process act in opposition to the authority of the court and cause impermissible prejudice to their opponents”).

III. CONCLUSION

2 As stated supra, “sanctions must be weighed in light of the full record in the case.”¹⁵
3 Petitioning Creditors have now thoroughly set forth Lopez’s appalling record of ignoring his
4 discovery obligations and *thumping his nose* at this Court’s authority and orders. His conduct is
5 inexcusable. Based on that, and on all of the foregoing, Petitioning Creditors respectfully request
6 that this Court issue an Order imposing monetary sanctions against Lopez in the amount of
7 \$12,133.50.

9 || Dated: October 19, 2007

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By: //s/ L. Scott Keehn
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¹⁵ *Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, supra, 602 F.2d at 1068.